Supreme Court, U. S.
FILED
JAN 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

v.

HAROLD BROWN, *et al.*,

Respondents.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION OF CHRYSLER CORPORATION FOR A WRIT OF CERTIORARI

ROBERT L. ACKERLY
THOMAS L. PATTEN
KENNETH W. WEINSTEIN
SELLERS, CONNER & CUNEO
1625 K Street, N.W.
Washington, D.C. 20006

LAWRENCE B. KRAUS
CHAMBER OF COMMERCE OF THE UNITED STATES

STANLEY T. KALECZYC
NATIONAL CHAMBER LITIGATION CENTER, INC.
Attorneys for the Chamber of Commerce of the United States

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1
REASONS FOR GRANTING THE WRIT 3
CONCLUSION 17
APPENDIX A 1a

TABLE OF AUTHORITIES

Cases:

Associated Dry Goods Corp. v. EEOC, 419 F.Supp. 814 (E.D. Va. 1976) 4
Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976) 4, 7
Burroughs Corp. v. Schlesinger, 403 F.Supp. 633 (E.D. Va. 1975) 4, 7
Chandler v. Roudebush, 425 U.S. 840 (1976) 11
Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975) 4, 8
Chrysler Corp. v. Schlesinger, 412 F.Supp. 171, 176 (D. Del. 1976) 9, 16
Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975) 4
Crown Central Petroleum Corp. v. Kleppe, 424 F.Supp. 744 (D. Md. 1976) 4
EPA v. Mink, 410 U.S. 73, 80 (1973) 14
Exxon v. Governor of Maryland, No. 77-10 2
FAA v. Robertson, 422 U.S. 255, 262 (1975) 14, 16
First National Bank of Boston v. Belotti, No. 76-1172 2
Garrett Corp. v. McLucas, C.A. No. 76-0260 (D.D.C., filed Feb. 17, 1976) 4
General Dynamics Corp. v. Dunlop, 427 F.Supp. 578 (E.D. Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.) 4, 7

Cases, continued: Page

Goodyear Tire & Rubber Co. v. Dunlop, C.A. No. 75-1828 (D.D.C. Dec. 9, 1975) 4

Government Sales Consultants, Inc. v. GSA, C.A. No. 77-1294 (D.D.C., filed Aug. 24, 1977) 4

GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n, 404 F.Supp. 352 (D. Del. 1975) 4

Gulf Oil Corp. v. Brennan, C.A. No. 72-F-4 (D. Colo., filed Jan. 2, 1974) 5

Honeywell Information Systems, Inc. v. NASA, C.A. No. 76-353 (D.D.C. Jul. 28, 1976), *appeal dismissed*, No. 76-1977 (D.C. Cir. May 6, 1977) 4, 8

Hughes Aircraft Co. v. Schlesinger, 384 F.Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.) 5

International Eng'r Co. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975) 4

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1970) 2, 8, 13

Lawyers' Coop. Publishing Co. v. Schlesinger, C.A. No. 1974-212 (W.D. N.Y. Apr. 22, 1975) 4

Leeds & Northrop Co. v. ERDA, C.A. No. 77-1047 (D.D.C., filed Jun. 11, 1977) 4

Malone v. White Motor Corp., No. 76-1184 2

McCoy v. Weinberger, 386 F.Supp. 504 (W.D. Ky. 1974) 5, 7

Metropolitan Life Ins. Co. v. Usery, 426 F.Supp. 150 (D.D.C. 1976), *cert. denied sub nom. Prudential Ins. Co. v. National Organization for Women*, ___ U.S. ___, 53 L.Ed.2d 238 (1977) 4, 7, 16

Military Audit Project v. Kettles, C.A. No. 7566 (D.D.C. May 17, 1976) 4

National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 676 n. 11 (D.C. Cir. 1976) 7, 9, 16

Cases, continued: Page

National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 767-70 (1974) 13

Neal-Cooper Grain Co. v. Kissinger, 385 F.Supp. 769 (D.D.C. 1974) 5

Olin Corp. v. Schlesinger, C.A. No. 75-0206 (E.D. Va., filed Apr. 30, 1975) 4

Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 612, 617 (D.C. Cir. 1976) 5

Pacific Architects and Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974) 9

Parke Town v. Hud, C.A. No. 75-1344 (E.D. Pa., filed May 13, 1975) 4

Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976) 4, 7

Pharmaceutical Mfrs. Ass'n v. Weinberger, 401 F.Supp. 444 (D.D.C. 1975) 4

Pharmaceutical Mfrs. Ass'n v. Weinberger, 411 F.Supp. 576 (D.D.C. 1976) 4

Planning Research Corp. v. FPC, 555 F.2d 970 (D.C. Cir. 1977) 4, 7

Prudential Ins. Co. v. HEW, C.A. No. 75-1773 (E.D. Pa., filed Jun. 23, 1975) 4

Sears, Roebuck and Co. v. Eckerd, No. 76C-244 (N.D. Ill. Aug. 6, 1976) 4

Sears, Roebuck and Co. v. GSA, 553 F.2d 1378 (D.C. Cir.), *cert. denied*, ___ U.S. ___ (1977) 4

Sears, Roebuck and Co. v. GSA, 384 F.Supp. 996 (D.D.C.), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974), *decision on remand*, 402 F.Supp. 376 (D.D.C. 1975), rev'd, 553 F.2d 1378 (D.C. Cir. 1977) 5, 8

Singer Co. v. Schlesinger, C.A. No. 3-75-1152 (N.D. Tex., filed May 20, 1975) 5

Cases, continued: Page

Sybion v. Kleppe, No. 76-492 (W.D. N.Y., filed Nov. 1, 1976) 4

Union Carbide Corp. v. Ray, C.A. No. 74-941 (D. Md., filed Sept. 5, 1974) 5

Union Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975) 4

United States Steel Corp. v. Schlesinger, 8 Fair Empl. Prac. Cas 923 (E.D. Va. 1974), *aff'd sub nom. Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Electric, Corp.*, __ U.S. __, 53 L.Ed.2d 239 (1977) 5

USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976) 4, 6

Vistron Corp. v. Andrus, No. 77-85-A (E.D. Va. Feb. 23, 1977) 4

Waterman Heights Nursing Home, Inc. v. Weinberger, C.A. No. 75-0063 (D. R.I., filed May 3, 1975) 5

Western Union v. Marshall, No. 77-659 2

Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown v. Westinghouse Elec. Corp.*, __ U.S. __, 53 L.Ed.2d 239 (1977) 7, 8, 15

Westinghouse Elec. Corp. v. Schlesinger, 392 F.Supp. 1246, 1249-52 (E.D. Va. 1974), *aff'd* 542 F.2d 1190 (4th Cir. 1976) 4, 16

Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n, 555 F.2d 82 (3d Cir. 1977) 3

Page

Statutes:

18 U.S.C. §1905 3

Freedom of Information Act:

5 U.S.C. §552 (Supp. V 1975) 3
5 U.S.C. §552(b)(4) 6
5 U.S.C. §552(a)(4)(B) 8
5 U.S.C. §552(a)(6)(A)(i) 10
5 U.S.C. §552(a)(4)(E) 10
5 U.S.C. §552(a)(4)(F) 10
5 U.S.C. §552(a)(4)(G) 10
5 U.S.C. §552(b)(1), (2), (5) and (7) 15

1974 Amendments of the Freedom of Information Act, Act of November 21, 1974, Pub. L. 93-502, 88 Stat. 1561 5

Civil Rights Act of 1964, Title VII, 78 Stat. 253, as amended, 42 U.S.C. §2000(e), *et seq.*; Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 . . . . . 11, 12

Legislative Materials:

S. Rep. No. 93-854, 93rd Cong. 2d Sess. 1 (1974) 10

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) 12

S. Rep. No. 813, 89th Cong., 1st Sess. 5, 9 (1965) 12, 15

Hearings on S. 1666 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 1974, 199 (1964) 8, 12, 13

Miscellaneous:

Arnold, *Who's Going Fishing in Government Files*, 6 Juris Doctor 17 (1976) 5

Page

Miscellaneous, continued:

Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 555 Tex L. Rev. 587 (1977) 5, 10

Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 Ad. L. Rev. (1976) 5

Kuersteiner and Herbach, *The FOIA: An Examination of the Commercial or Financial Exemption*, 16 Santa Clara L. Rev. 193 (1976) 6

O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Lawyer 1125 (1975) 6, 11, 15

Patten and Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Ad. L. Rev. 193 (1977) 6, 11, 15

Wallace, *Proper Disclosure and Indecent Exposure: Protection of Trade Secrets and Confidential Commercial Information Supplied to the Government*, 34 Fed. B.J. 295 6

A Review of the Fourth Exemption of the FOIA, 9 Akron L. Rev. 673 (1976) 6, 15

Freedom of Information: Too Much of a Good Thing? 662 Fed. Cont. Rep. K-1 (Dec. 27, 1976) 6

Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971 (1975) 6

Protection From Government Disclosure – The Reverse-FOIA Suit, 1976 Duke L.J. 330 (1976) 6, 11

Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard, 60 Cornell L. Rev. 109 (1974) 6

Miscellaneous, continued: Page

Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection, 70 Nw. U.L. Rev. 995 (1976) 6, 11

The Freedom of Information Act – A Tool of Industry?, Sacramento Bee, Jan. 1, 1978 ..... 3, 5, 6, 8

Use, Abuse of the Freedom of Information Act, Washington Post, July 27, 1976 ..... 6, 8

Would Macy's Tell Gimbels: Government Controlled Business Information and the Freedom of Information Act, Forwards and Backwards, 6 Loy. Chi. L.J. 594 (1975) 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

v.

HAROLD BROWN, *et al.*,

Respondents.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

This brief *amicus curiae* is filed on behalf of the Chamber of Commerce of the United States with the written consent of the petitioner and respondents, as appears in Appendix A herein.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the United States, with a total membership in excess of 69,000 enterprises and organizations representing businessmen and women

throughout the United States. More than 3,700 state and local chambers of commerce and trade associations are members.

The Chamber represents its members in a broad spectrum of matters of critical importance to the business community, including participation as an *amicus curiae* in cases before this Court.[1]

The instant case is of vital concern to the large number of Chamber members who have submitted—and continue to submit—to Federal agencies confidential business information which may be subject to disclosure under the Freedom of Information Act. As more fully set forth herein, at stake in this case is the ability of American business to protect adequately business data and trade secrets tendered in confidence to governmental entities from both foreign and domestic competitors.

In addition, the Chamber and its members are concerned that a judicial determination which impairs the ability of the owners of such information to assert affirmatively and vigorously their proprietary interests will ultimately result in a reluctance on the part of business to cooperate voluntarily with government

---

[1] *E.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (disclosure of trade secrets); Exxon v. Governor of Maryland, No. 77-10 (impact of State divesture statute on interstate commerce); First National Bank of Boston v. Bellotti, No. 76-1172 (corporate First Amendment speech); Western Union v. Marshall, No. 77-659 (application of overtime provisions of Fair Labor Standards Act to managerial employees during a strike); Malone v. White Motor Corp., No. 76-1184 (preemption of state law by National Labor Relations Act).

agencies in the collection of data necessary to the performance of the agencies' statutory missions.

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit Court of Appeals in *Chrysler Corporation v. Schlesinger*[2] threatens American industry with unprecedented disclosure of privately owned business secrets by federal officials acting under the Freedom of Information Act ("FOIA").[3] This Court has not addressed the conflicting judicial interpretations[4] which have arisen over the right to prevent governmental disclosure of private business records, particularly to competitors. The recent proliferation of "reverse" FOIA actions by companies seeking to preclude federal release of confidential business data,[5] the increasing public use of the FOIA,[6]

---

[2] Citations to the opinion of the Court of Appeals in this brief are to the appropriate pages of Appendix A in the Petition for Writ of Certiorari.

[3] 5 U.S.C. §552 (Supp. V 1975).

[4] The courts have disagreed upon whether the FOIA and other statutes (*e.g.*, 18 U.S.C. §1905) provide a right to prevent agency release of private records; the extent to which the owner of the records may obtain a *de novo* judicial determination of entitlement to confidentiality; and whether agency officials may, in their discretion, release confidential records found to be exempt from FOIA disclosure requirements. *See* notes 13, 17, 29 and 35 *infra*, and related text.

[5] A Justice Department official has recently reported that 102 reverse FOIA cases are pending in the courts. *The Freedom of Information Act - A Tool of Industry?*, Sacramento Bee, Jan. 1, 1978 at A3. A partial listing of actions contesting disclosure of business records includes: Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm'n, 555 F.2d 82 (3d Cir. 1977);

[footnote continued]

and the widespread attention the reverse FOIA

Planning Research Corp. v. FPC, 555 F.2d 970 (D.C. Cir. 1977); Sears, Roebuck and Co. v. GSA, 553 F.2d 1378 (D.C. Cir.), *cert. denied* ____ U.S. ____ (1977); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Elec. Corp., ____ U.S. ____, 53 L.Ed.2d 239 (1977); Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976); Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975); Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975); International Eng'r Co. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975); Union Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975); Government Sales Consultants, Inc. v. GSA, C.A. No. 77-1294 (D.D.C., filed Aug. 24, 1977); Leeds & Northrop Co. v. ERDA, C.A. No. 77-1047 (D.D.C., filed June 11, 1977); Vistron Corp. v. Andrus, No. 77-85-A (E.D. Va. Feb. 23, 1977); Associated Dry Goods Corp. v. EEOC, 419 F. Supp. 814 (E.D. Va. 1976); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976); Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp. 744 (D. Md. 1976); Garrett Corp. v. McLucas, C.A. No. 76-0260 (D.D.C., filed Feb. 17, 1976); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578 (E.D. Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.); Honeywell Information Systems, Inc. v. NASA, C.A. No. 76-353 (D.D.C. Jul. 28, 1976), *appeal dismissed*, No. 76-1977 (D.C. Cir. May 6, 1977); Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976), *cert. denied sub nom.* Prudential Ins. Co. v. National Organization for Women, ____ U.S. ____, 53 L.Ed.2d 238 (1977); Military Audit Project v. Kettles, C.A. No. 7566 (D.D.C. May 17, 1976); Pharmaceutical Mfrs. Ass'n v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976); Sears, Roebuck and Co. v. Eckerd, No. 76C-244 (N.D. Ill. Aug. 6, 1976); Sybion v. Kleppe, No. 76-492 (W.D. N.Y., filed Nov. 1, 1976); USS-OCF-W&M v. Eckerd, C.A. No. 76-1933 (D.D.C. Dec. 9, 1976); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633 (E.D. Va. 1975); Parke Town v. HUD, C.A. No. 75-1344 (E.D. Pa., filed May 13, 1975); Goodyear Tire & Rubber Co. v. Dunlop, C.A. No. 75-1828 (D.D.C. Dec. 9, 1975); GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352 (D. Del. 1975); Lawyers' Coop. Publishing Co. v. Schlesinger, C.A. No. 1974-212 (W.D. N.Y. Apr. 22, 1975); Olin Corp. v. Schlesinger, C.A. No. 75-0206 (E.D. Va., filed Apr. 30, 1975); Pharmaceutical Mfrs. Ass'n v. Weinberger, 401 F. Supp. 444 (D.D.C. 1975); Prudential Ins. Co. v. HEW, C.A. No.

[footnote continued]

phenomenon has received,[7] attest to the importance of the interests at stake in this case and the need for clarification of the law which only this Court can provide.

75-1773 (E.D. Pa., filed June 23, 1975); Singer Co. v. Schlesinger, C.A. No. 3-75-1152 (N.D. Tex., filed May 20, 1975); Waterman Heights Nursing Home, Inc. v. Weinberger, C.A. No. 75-0063 (D.R.I., filed May 3, 1975); Gulf Oil Corp. v. Brennan, C.A. No. 72-F-4 (D. Colo., filed Jan. 2, 1974); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.); McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974); Sears, Roebuck and Co. v. GSA, 384 F. Supp. 996 (D.D.C.), *stay dissolved*, 509 F.2d 527 (D.C. Cir. 1974), *decision on remand*, 402 F. Supp. 378 (D.D.C. 1975), *rev'd*, 553 F.2d 1378 (D.C. Cir. 1977); Union Carbide Corp. v. Ray, C.A. No. 74-941 (D. Md., filed Sept. 5, 1974); United States Steel Corp. v. Schlesinger, 8 Fair Empl. Prac. Cas. 923 (E.D. Va. 1974), *aff'd sub nom.* Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom.* Brown v. Westinghouse Electric Corp., ____ U.S. ____, 53 L.Ed.2d 239 (1977).

[6]The 1974 amendments of the FOIA, Act of November 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, achieved their intended purpose of facilitating use of the disclosure statute. For example, the FBI received 447 FOIA requests in 1974; the number increased to 13,875 in 1975 and approximately 17,000 in 1977. During the same period the FBI's cost of implementing the statute rose from $160,000 to $9.1 million. The Department of Justice handled 100 FOIA appeals the year preceding the 1974 amendments and 1,276 the following year. *See* Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 612, 617 (D.C. Cir. 1976); *The Freedom of Information Act - A Tool of Industry?*, Sacramento Bee, Jan. 1, 1978, at A-3.

[7]*See, e.g.*, Arnold, *Who's Going Fishing in Government Files*, 6 Juris Doctor 17 (1976); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Texas L. Rev. 587 (1977); Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 Ad. L. Rev. (1976);

[footnote continued]

The conflicting decisions in reverse FOIA cases stem from the failure of the Act to provide an explicit mechanism for protecting private business records in government files. FOIA Exemption 4[8] declares that trade secrets and confidential commercial or financial information[9] are not subject to the FOIA disclosure

Kuersteiner and Herbach, *The FOIA: An Examination of the Commercial or Financial Exemption*, 16 Santa Clara L. Rev. 193 (1976); O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Lawyer 1125 (1975); Patten and Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Ad. L. Rev. 193 (1977); Wallace, *Proper Disclosure and Indecent Exposure: Protection of Trade Secrets and Confidential Commercial Information Supplied to the Government*, 34 Fed. B.J. 295; Note, *Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. U.L. Rev. 995 (1976); Note, *A Review of the Fourth Exemption of the FOIA*, 9 Akron L. Rev. 673 (1976); Note, *Protection From Government Disclosure - The Reverse-FOIA Suit*, 1976 Duke L.J. 330 (1976); Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard*, 60 Cornell L. Rev. 109 (1974); Note, *Would Macy's Tell Gimbels: Government Controlled Business Information and the Freedom of Information Act, Forwards and Backwards*, 6 Loy. Chi. L.J. 594 (1975). *See also* Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971 (1975); *Freedom of Information: Too Much of a Good Thing?*, 662 Fed. Cont. Rep. K-1 (Dec. 27, 1976); *The Freedom of Information Act - A Tool of Industry?*, Sacramento Bee, Jan. 1, 1978 at A-3; *Use, Abuse of the Freedom of Information Act*, Washington Post, July 27, 1976, at A-4.

[8] 5. U.S.C. §552(b)(4).

[9] The nature of the information in issue in Exemption 4 cases has included such classes of records as:

(1) technical and financial data contained in government contracts and competitive proposals [*e.g.*, design data and engineering drawings for building components contained in a successful government contract proposal (USS-OCF-W&M v.

[footnote continued]

requirements. The Act, however, is essentially concerned with promoting disclosure and does not state how Exemption 4's protection is to be achieved. This question has precipitated substantial judicial disagreement to the point where some courts, represented in the extreme by the Third Circuit decision in *Chrysler*, have effectively precluded a company which disagrees with a governmental decision to disclose its business secrets from obtaining the protection Congress intended Exemption 4 to provide.[10] Unless the split among the circuit courts is repaired, *Chrysler v. Schlesinger* and

Eckerd, *supra* note 5, slip op. at 2); a 1,200 page technical methodology for development of a computer based regulatory information system contained in a successful proposal for a government contract (Planning Research Corp. v. FPC, 555 F.2d 970, 971 (D.C. Cir. 1970); costs, prices, profits and cash flow provisions in a sub-contract under a government contract for nuclear powered propulsion systems (Babcock & Wilcox Co. v. Rumsfeld, *supra* note 5, 70 F.R.D. at 598); prices and discounts for components for a computer data processing system contained in an unsuccessful proposal for a government contract (Burroughs Corp. v. Schlesinger, *supra* note 5, 403 F. Supp. at 637)];

(2) employment data [*e.g.*, work force analyses, manning tables, and projected promotions data in affirmative action plans and EEO-1 forms (Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1195; Metropolitan Life Ins. Co. v. Usery, *supra* note 5, slip op. at 12; General Dynamics Corp. v. Dunlop, *supra* note 5, slip op. at 5)];

(3) financial reports [*e.g.*, data disclosing income, taxes, deductions, earnings, profits, net worth, cost breakdowns and salaries (National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 676 n. 11 (D.C. Cir. 1976); McCoy v. Weinberger, *supra* note 5, 386 F. Supp. at 505)]; and

(4) reserve data [*e.g.*, raw data relevant to reserve estimates for natural gas wells (Pennzoil Co. v. FPC, *supra* note 5, 534 F.2d at 627)].

[10] *See* arguments I and II *infra*.

similar decisions can be expected to accelerate the reported misuse of FOIA for discovery of competitors' business secrets[11] and the resulting impairment of fair commercial competition and subversion of the free enterprise system.[12]

I.

THE THIRD CIRCUIT ERRED IN DENYING THE OWNER OF BUSINESS RECORDS THE OPPORTUNITY TO PROVE THEY ARE EXEMPT FROM PUBLIC DISCLOSURE.

Prior to *Chrysler,* the Fourth and District of Columbia Circuits had ruled that a judicial determination as to whether business records were within FOIA Exemption 4 was to be made *de novo.*[13] The

---

[11] *See, e.g.,* Honeywell Information Systems v. NASA, *supra* note 5, slip op. at 8 n. 8 ("The problems posed by companies using the Freedom of Information Act to conduct 'industrial espionage' remain troublesome."); *The Freedom of Information Act - A Tool of Industry, supra* note 7; *Use, Abuse of the Freedom of Information Act, supra* note 7.

[12] *See, e.g.,* Hearings on FOIA Bill S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 199 (1964) ("[N]ot only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors."). *Cf.* Kewanee Oil. Co. v. Bicron Corp., 416 U.S. 470, 481 (1974).

[13] *See* Sears, Roebuck and Co. v. GSA, 553 F.2d 1378, 1381 (D.C. Cir. 1977) ("The review standard of the FOIA in a suit to compel disclosure is also the appropriate standard in the reverse FOIA case."); Charles River Park "A", Inc. v. HUD, *supra* note 5, 519 F.2d at 940 n. 4; Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1214-15. The FOIA expressly requires *de novo* consideration of whether records are within an exemption in an action brought to compel disclosure. 5 U.S.C. §552(a)(4)(B).

determination was to be *de novo* regardless of whether the issue was raised by a requester in an FOIA action to compel disclosure of the records, or by a company seeking to prevent disclosure in a reverse FOIA action.[14] In both direct and reverse actions under Exemption 4, the courts have required the proponent of confidentiality to adduce "specific factual or evidentiary material" establishing the confidential nature and competitive value of the records.[15]

In line with the practice of these courts, the District Court in the instant case held an evidentiary hearing in which Chrysler was permitted to prove the confidential nature of the data in issue. On the basis of Chrysler's proof, the District Court issued detailed factual findings concluding that Chrysler could be harmed competitively by disclosure of portions of the data, and these data were thus within Exemption 4.[16] The Third Circuit reversed. It held, in effect, that while a company requesting release of Chrysler's data would be entitled to a *de novo* determination of their confidentiality, Chrysler was not. Chrysler's reverse action was confined to review of the administrative record, and the presentation of evidence to the District Court to prove the confidentiality of the data was held to be in

---

[14] *Id.*

[15] *See* National Parks and Conservation Ass'n v. Kleppe, 555 F.2d 673, 679 (D.C. Cir. 1976). Mere "conclusory opinions" as to confidentiality have been held to be insufficient to achieve the FOIA's purpose of promoting the fullest responsible disclosure. *Id. See also* Pacific Architects and Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974).

[16] Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 176 (D. Del. 1976).

error.[17] Because the FOIA itself inherently precludes proper administrative consideration of the applicability of Exemption 4 to private commercial records, the Third Circuit's ruling leaves businesses with virtually no opportunity to prove their records are deserving of the protection Congress intended Exemption 4 to provide.

To facilitate "freer and more expeditious public access to government information,"[18] Congress amended the FOIA in 1974[19] *requiring agency determinations of releasibility to be made within ten days after receipt of a request.*[20] This ten day limitation on the time for agency decision virtually precludes an effective administrative assessment of the justification for confidentiality of business records under Exemption 4. The agency cannot, within this brief time, provide the owner of the records, the only party with both the incentive and detailed knowledge necessary to defend the records' proprietary nature, an effective opportunity to prepare and present evidence.[21] Nor can the agency

---

[17]App. A at 38a-39a.

[18]S. Rep. No. 93-854, 93rd Cong., 2nd Sess. 1 (1974).

[19]*See* note 6, *supra.*

[20]5 U.S.C. §552(a)(6)(A)(i). Other provisions of the 1974 Act also encourage disclosure. *See, e.g.,* 5 U.S.C. §552(a)(4)(E) (Attorney's fees and litigation costs may be assessed against agencies if the complainant substantially prevails); 5 U.S.C. §552(a)(4)(F) (agency employees who arbitrarily withhold records may be subject to Civil Service Commission disciplinary action; 5 U.S.C. §552(a)(4)(G) (agency employees failing to comply with Court order may be punished for contempt).

[21]*See Clement, supra* note 7, 55 Tex. L. Rev. at 635 ("Ten days is clearly insufficient to complete the lengthy process of notification of submitters, preparation of arguments by sub-

[footnote continued]

itself effectively assess the need for confidential treatment, for it has neither the time, the real stake in the outcome (as it would if government records were requested), nor the factual knowledge and expertise required for a competent evaluation.[22] And agency officials always face the threat of disciplinary action and other sanctions for improper refusal to disclose the requested records.[23] Thus the "administrative record" upon which the Third Circuit requires a company to rely for its sole protection is inherently incapable of competently addressing the need for confidential treatment.

The conclusion of the Fourth and District of Columbia Circuits that Exemption 4 can be properly implemented only when the same *de novo* consideration applicable to the direct FOIA suit also is applied in the reverse FOIA action,[24] is directly supported by this Court's decision in *Chandler v. Roudebush,* 425 U.S. 840 (1976). The issue presented in *Chandler* was whether the Equal Employment Opportunity Act of 1972[25] gave federal employees the same right to a trial

---

mitters, and consideration of these arguments by agencies."; Note, *supra* note 7, 1976 Duke L. J. at 361 ("The Act neither makes provisions, nor allows sufficient time, for notification of the party who has submitted the information to the agency of a decision to release the documents").

[22]*Id;* Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1212-13; Note, *supra* note 7, 70 Nw. U.L. Rev. at 998-99; O'Reilly, *supra* note 7, 30 Bus. L. at 1134, 1146; Patton, *supra* note 7, 29 Ad. L. Rev. at 202.

[23]*See* note 20, *supra.*

[24]*See* note 13 *supra.*

[25]Pub. L. 92-261, 86 Stat. 103.

de novo of employment discrimination claims as "private-sector" employees enjoyed under Title VII of the Civil Rights Act of 1964.[26] Although the 1972 Act did not expressly provide *de novo* consideration, the Court held that the relevant statutory language and legislative history revealed a congressional purpose to give federal employees the same form of civil action granted to private sector employees, which encompassed a trial *de novo*.

The FOIA similarly contains an express requirement for *de novo* consideration of the issue of confidentiality under Exemption 4 in a civil action to compel disclosure. The clear legislative intent to effect protection for confidential business records against disclosure to competitors[27] squarely supports the

---

[26]78 Stat. 253, as amended 42 U.S.C. §2000(e) et seq. (Supp. V 1975).

[27]Congress intended Exemption 4 to "assure the confidentiality" of business information which "would not customarily be made public by the person from whom it was obtained by the Government." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), 1966 U.S. Code Cong. & Ad. News 2418, 2427. *See also* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

The legislative history of Exemption 4 discloses that its purpose was to remedy the problem that would result if private business information were to become available to competitors through governmental disclosure. *See, e.g.*, the comments of a Treasury Department official during the Senate Hearings on the FOIA bill:

> We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of a competitor.

Hearings on S. 1666 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,

[footnote continued]

decisions of the Fourth and District of Columbia Circuits to extend the right to a *de novo* determination to reverse FOIA actions as well.[28] The Third Circuit's denial of this fundamental right should be redressed by this Court.

II.

BUSINESS SECRETS ADMITTEDLY WITHIN EXEMPTION 4 SHOULD NOT BE DISCLOSABLE AT THE DISCRETION OF AGENCY OFFICIALS.

The Third Circuit's decision bestows upon federal officials the authority to disclose in their discretion business records which are acknowledged to be within Exemption 4.[29] Even if Respondents were to find, as

---

88th Cong., 1st Sess. 174 (1964). Similarly the comments of a Justice Department official on the bill provide:

> A second problem area lies in the large body of Government information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. . . . [T]he greater part of such information is exacted, by statute, in the course of necessary regulatory or governmental functions.
>
> Again, not only as a matter of fairness, but as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.

Id. at 199. *See also* National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 767-70 (1974).

Exemption 4 grants "explicit federal protection" to proprietary information provided to federal agencies. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 494 (1974) (Marshall J., concurring).

[28]*See* note 13 *supra*.

[29]App. A at 38a.

did the District Court, that disclosure of Chrysler's competitively valuable records could harm the Company, they could nevertheless release the data if they find public disclosure to be "desireable."[30] This decision would be reviewable only to determine whether the agency considered the "proper factors."[31]

The reasons why it is inherently infeasible for agency officials, within the ten day decision period prescribed by the FOIA, to intelligently balance a company's interest in the confidentiality of its business secrets against any public interest in disclosure have already been discussed.[32] Although these factors alone compel reversal of the Third Circuit's decision, more fundamentally the Court of Appeals also failed to perceive that Congress, in defining the scope of the FOIA exemptions, has already "balanced" the competing public and private interests.[33] Exemption 4 was drafted to provide a "workable and balanced formula" for determining which records should be publicly available and which are necessary to maintain in confidence.[34] "[T]he Act was intended, to use the language of the Senate report, to set 'up workable standards for what records should and should *not* be open to public

---

[30] *Id.*

[31] *Id.*

[32] *See* discussion at pp. 10-11 *supra*.

[33] *See* FAA v. Robertson, 422 U.S. 255, 262 (1975).

[34] *Id. See also* EPA v. Mink, 410 U.S. 73, 80 (1973) (The Act attempts to "provid[e] a workable formula which encompasses, balances, and protects all interests. . . .").

inspection'."[35] Balancing of interests by agency officials is thus inappropriate since Exemption 4 describes types of records for which Congress has determined that the interest in confidentiality presumptively outweighs that in disclosure.

Several of the other nine FOIA exemptions were adopted for the protection of *governmental interests* in confidentiality.[36] Where data protected by these exemptions is in issue, an agency appropriately may waive the governmental interest and disclose such documents even though they may be exempt. But Exemption 4 plainly protects the *private interest* of businesses in the confidentiality of their records. It was erroneous for the Court of Appeals to give agency officials the discretionary power to waive this private interest in confidentiality, since this would permit administrative nullification of the carefully considered protections that Congress embodied in Exemption 4.[37]

The Third Circuit's decision thus ignores this Court's declaration that the FOIA exemptions already encom-

---

[35] Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1211, *citing* S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). (Emphasis added by the court.)

[36] *See, e.g.*, FOIA Exemptions 1, 2, 5 and 7, 5 U.S.C. §552(b)(1), (2), (5) and (7).

[37] The critical distinction between the government's right to disclose its own records, even though exempt, and its right to disclose private records, is discussed in Westinghouse Elec. Corp. v. Schlesinger, *supra* note 5, 542 F.2d at 1210; O'Reilly, *supra* note 7, 30 Bus. Lawyer at 1134; Note, *A Review of the Fourth Exemption of the Freedom of Information Act*, *supra* note 7, 9 Akron L. Rev. at 694; Patten, *supra* note 7, 29 Ad. L. Rev. at 202.

pass a proper balancing of the interests involved[38] and dangerously erodes the effectiveness of Exemption 4. Several courts have had occasion to discuss the potential competitive abuses which could result from the governmental disclosure of company records.[39] This Court should not permit the FOIA to become a vehicle for competitive misconduct, in contravention of Congress' clear mandate, at the whim of agency officials.

---

[38] *See* FAA v. Robertson, 422 U.S. 255, 262 (1975).

[39] *See, e.g.*, National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976) (Disclosure of company's financial data would provide competitors with valuable insights into the company's operational strengths and weaknesses, facilitating selective pricing, market concentration, expansion plans and possible takeover bids); Metropolitan Life Insurance Company v. Usery, *supra* note 5, slip op. at 14, 24 (Disclosure of work force analyses would increase a company's vulnerability to employee raiding; disclosure of projected promotion data would adversely affect employee productivity and morale); Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249-52 (E.D. Va. 1974) *aff'd* 542 F.2d 1190 (4th Cir. 1976) (Disclosure of plaintiff company's work force analyses could enable a competitor to estimate the company's labor costs, profit margin, unit manufacturing cost, vulnerability to a price change and new product development). *See also* Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 176 (D. Del. 1976).

CONCLUSION

For the reasons set forth above, the Chamber of Commerce of the United States respectfully requests this Court to grant the Petition for Certiorari.

Respectfully submitted,

ROBERT L. ACKERLY
THOMAS L. PATTEN
KENNETH W. WEINSTEIN

SELLERS, CONNER & CUNEO
1625 K Street, N.W.
Washington, D.C. 20006

LAWRENCE B. KRAUS

CHAMBER OF COMMERCE OF
THE UNITED STATES

STANLEY T. KALECZYC

NATIONAL CHAMBER LITIGATION
CENTER, INC.

Attorneys for the Chamber of Commerce of the United States

APPENDIX

APPENDIX

COLE, ZYLSTRA & RAYWID
ATTORNEYS AT LAW
2011 EYE STREET, N.W.
WASHINGTON, D.C. 20006

December 22, 1977

Thomas L. Patten, Esquire
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

Re: *Chrysler Corp. v. Brown, et al.*

Dear Mr. Patten:

On behalf of Chrysler Corporation, we hereby consent to your fliing a brief *amicus curiae* on behalf of the Chamber of Commerce of the United States in *Chrysler Corp. v. Brown*. It is my understanding that you intend to support the petition for writ of certiorari.

Very truly yours,

/s/Burt A. Braverman
Burt A. Braverman

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

[SEAL]

December 22, 1977

Thomas L. Patten, Esquire
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

Re: *Chrysler Corporation v. Schlesinger*
(C.A. 3)

Dear Mr. Patten:

I hereby consent to the filing of a brief *amicus curiae* on behalf of the Chamber of Commerce of the United States in the Supreme Court in this case.

Sincerely,

/s/Wade H. McCree, Jr.
WADE H. MCCREE, JR.
Solicitor General